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THE NEW WORKERS' COMPENSATION ACT—SOMETHING FOR ALL MONTANANS TO BE ASHAMED OF

Terry N. Trieweiler*

I. INTRODUCTION

Due largely to the disproportionate influence of Montana's perpetually unhappy logging industry,¹ the 1987 session of Montana's legislature virtually gutted Montana's Workers' Compensation Act,² which had provided decent, but not overly-generous, benefits, to Montana workers since 1975.

Although there were many changes in the Act, five principal changes assure that the workers' compensation system will, in the future, provide no more than the illusion of security for injured workers. The most significant changes include the definition of injury,³ the definition of disability,⁴ the circumstances under which partial disability benefits are awarded,⁵ practical elimination of lump sum conversions,⁶ and limitations both by statute and agency regulation on the attorney fees that can be charged by claimants' attorneys.⁷

Other changes which will not be discussed in this article include reductions in death benefits,⁸ reduction in the income from which total disability rates are calculated,⁹ liberalization of the insurer's right to subrogation,¹⁰ freezing of disability rates for a period of two years,¹¹ and dramatic changes in the role of rehabilita-

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1. Montana is the only state in the Northwest in which the logging industry has successfully opposed enactment of a Forest Practices Act to prevent degradation of private forest lands. See Missoulian, October 21, 1988, at 10, col. 2. Furthermore, it appears that at the time that this article was being prepared that the logging industry will be successful in getting wilderness legislation vetoed after ten years of study, debate, and compromise. See Missoulian, October 19, 1988, at 1, col. 1, and 10, col. 1; Missoulian, October 21, 1988 at 1, col. 1, and 10, col. 1; Missoulian, October 27, 1988, at 7, col. 1; and Missoulian, November 2, 1988, at 1, col. 2.

2. MONT. CODE ANN. §§ 39-71-101 to -2914 (1987).

3. MONT. CODE ANN. § 39-71-119 (1987).

4. MONT. CODE ANN. § 39-71-116(14), (15), (21) (1987).

5. MONT. CODE ANN. § 39-71-703 (1987).

6. MONT. CODE ANN. § 39-71-741 (1987).

7. MONT. CODE ANN. §§ 39-71-611, 612 (1987); ADMIN. R. MONT. 24.29.3801 (1987).

8. MONT. CODE ANN. § 39-71-721(5) (1987).

9. MONT. CODE ANN. § 39-71-123(2) (1987).

10. MONT. CODE ANN. § 39-71-414(6)(a), (b) (1987).

11. MONT. CODE ANN. § 39-71-701(5) (1987); MONT. CODE ANN. § 39-71-702(6) (1987); MONT. CODE ANN. § 39-71-703(3) (1987).

tion so that it has now become an obstacle course rather than providing any practical benefit to the claimant.¹²

All of these changes were made under the guise of making Montana competitive economically with other western states, even though less than one year after the legislative session and before any reduction in rates, the Administrator for the Division of Workers' Compensation admitted that Montana's rates did not rank even in the top ten of the western states for most occupations.¹³

With this background, I would like to elaborate on what I think were the five most significant changes to the Workers' Compensation Act, and how injured workers will be adversely affected in the future.

II. DEFINITION OF INJURY

Under previous law, injury was defined as "tangible happening of a traumatic nature from an unexpected cause or unusual strain resulting in either external or physical harm"¹⁴ Montana's previous definition of injury was, by design, broad and included harm from trauma or unusual strain. The reason was simple and fair. The purpose of workers' compensation is to provide some security to workers and their families when they are no longer able to work because of physical harm that resulted from their employment.¹⁵ The social consequence is the same, regardless of how the injury occurred. The injured worker and his family must somehow continue to pay bills and provide for food and housing. It is better that that expense be passed along to the industry which benefited from the worker's labor, than be borne solely by the worker and his family or the rest of society. It should make no logical difference whether the worker is disabled because of a trauma, sudden strain, or inhalation of some poisonous fume.

Pursuant to the previous definition of injury, workers were found by Montana courts to have been injured when trauma caused heart attack,¹⁶ phlebitis,¹⁷ and bilateral carpal tunnel syn-

12. MONT. CODE ANN. §§ 39-71-1003 to -1033 (1987).

13. Missoulain, May 25, 1988, at 9, col. 2.

14. MONT. CODE ANN. § 39-71-119 (1985) (emphasis added), amended by MONT. CODE ANN. § 39-71-119 (1987). Subsection (2) of the definition also included cardiovascular and pulmonary or respiratory diseases contracted by fire fighters during the course of their employment.

15. See *Levo v. General-Shea-Morrison*, ___ Mont. ___, 280 P.2d 1086 (1955) and MONT. CODE ANN. § 39-71-105 (1987).

16. *Davis v. Jones*, ___ Mont. ___, 701 P.2d 351 (1985).

17. *Wise v. Perkins*, 202 Mont. 157, 656 P.2d 816 (1983).

drome over a period of time from repeated mini-trauma.¹⁸ Workers have been found to suffer an injury from unusual strain where lifting caused a back injury,¹⁹ where previous heart disease was aggravated by stress from employment,²⁰ where repeated minor trauma accelerated the degenerative process in a claimant's knee joints,²¹ and where work-stress ruptured a pre-existing aneurysm.²²

While each of the above cases was greeted by outcries from employers and insurers that the system had run amok, all were logically consistent with the social purpose for providing workers' compensation. In every case, the employee went to work physically capable of providing for himself and his family; as a result of some occurrence in the work place, he was no longer capable of doing so; and in every instance the worker had forfeited the common-law right to full legal redress.²³ What logical difference did it make to the worker or to the rest of society that the worker's disability resulted from a series of mini-trauma, as opposed to one solid blow to the head? The effect was the same, the result was the same, and the economic impact on the worker and society was the same.

Under the new Workers' Compensation Act, however, logic has no place in a determination of which disabled workers will or will not be covered. The new law provides in relevant part that:

- (2) An injury is caused by an accident. An accident is:
 - (a) an unexpected traumatic incident or unusual strain;
 - (b) identifiable by time and place of occurrence;
 - (c) identifiable by member or part of the body affected; and
 - (d) caused by a specific event on a single day or during a single work shift.
- (3) "Injury" or "injured" does not mean a physical or mental condition arising from:
 - (a) emotional or mental stress; or
 - (b) a non-physical stimulus or activity.
- (4) "Injury" or "injured" does not include a disease that is not caused by an accident.
- (5) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical harm in relation to other factors contributing to the

18. *Hoehne v. Granite Lumber Co.*, 189 Mont. 221, 615 P.2d 863 (1980).

19. *Robins v. Ogle*, 157 Mont. 328, 485 P.2d 692 (1971).

20. *Tocco v. City of Great Falls*, ____ Mont. ____, 714 P.2d 160 (1986).

21. *Shepard v. Midland Foods, Inc.*, 205 Mont. 146, 666 P.2d 758 (1983).

22. *Snyder v. San Francisco Feed & Grain*, ____ Mont. ____, 748 P.2d 924 (1987).

23. Full legal redress is provided to every other citizen in Montana. MONT. CONST. art.

physical harm.²⁴

In other words, workers who are disabled from trauma that occurs during the course of their employment on two or more consecutive days are no longer "injured." Workers who suffer disabling emotional breakdowns from taunting or ridicule at work are no longer "injured." Brain-damaged workers who have suffered a ruptured aneurysm and heart attack victims who suffer myocardial infarctions from job-related stress are no longer "injured." Even though these people may be severely disabled and the economic impact is the same as if they had been hit on the head with a baseball bat, the legislature has made an arbitrary decision that the rest of society or workers themselves, rather than the employer, must bear the entire burden of these workers' disabilities.

While excluding these large numbers of disabled workers from workers' compensation benefits may provide some short-term impact on premiums paid by employers, the cost will have to be borne somewhere, whether through the increased cost of welfare benefits, or through the increase in crime that usually results when the least fortunate in society are deprived of dignity and any reasonable prospect of providing for themselves and their families. It made more sense that the cost be borne as it had been previously by the industries which benefited from the workers' labor before the workers were cast away as no longer suitable.

III. DEFINITION OF DISABILITY

Permanent partial disability was previously defined as "a condition resulting from injury as defined in this chapter that results in the actual loss of earnings or *earning capability* less than total that exists after the injured worker is as far restored as the permanent character of the injuries will permit."²⁵ Loss of "earning capability" was repeatedly held by the Montana Supreme Court to mean something different than an actual loss of earnings. It was defined by the Montana Supreme Court in *Shaffer v. Midland Empire Packing Co.*²⁶ as "a loss of ability to earn in the open labor market."²⁷

Compensation for this loss of "ability" was extremely important to injured workers for a number of reasons. The worker may

24. MONT. CODE ANN. § 39-71-119 (1987).

25. MONT. CODE ANN. § 39-71-116(12) (1985) (emphasis added), amended by MONT. CODE ANN. § 39-71-115(14) (1987).

26. 127 Mont. 211, 259 P.2d 340 (1953).

27. *Id.* at 214, 259 P.2d at 342.

not have been working at his or her highest capacity at the time of the injury. Workers may have been performing seasonal employment or a temporary job during a lay-off from their primary employment.²⁸ Under those circumstances, comparison of their wages at the time of their injury to the wages they are subsequently able to earn is not an accurate reflection of what the worker has lost due to the injury.

Secondly, a highly-motivated worker with pressing financial needs may overextend himself following his injury to try to retain a high-paying job, even though he has no long-term prospects for continuing in that employment. Under those circumstances, his options on the open labor market are much more reflective of his loss than a comparison of his actual pre-injury and post-injury earnings.

Finally, it is not uncommon for an employer to retain an injured worker in a makeshift position following his injury until a determination has been made regarding the extent of that worker's disability, but then to terminate that same worker after the determination has been made. Since the worker has no control over the duration of employment, it is unfair to use post-injury earnings as the sole indicator of earning capacity.

The rationale for basing permanent partial disability on a worker's earning capacity in the open labor market, rather than limiting it to those who have sustained an actual wage loss at the time that partial disability benefits are sought, is best explained in the Montana Supreme Court's decision in *Fermo v. Superline Products*.²⁹ There, the court explained that:

It may be years before the effect is felt. But a man with a stiffened arm or damaged back or badly weakened eye will presumably have a harder time doing his work well and meeting the competition of young and healthy men. When a man stands before the Workers' Compensation Court with proven permanent physical injuries, for which the exclusive remedy clause has abolished all possibility of common-law damages, it is not justifiable to tell him he has undergone no impairment of earning capacity, solely on the strength of current pay checks.³⁰

In spite of the purported humanitarian purpose for which

28. Common examples are loggers working in the service industry during spring break-up, construction workers, contractors and carpenters who work as ski instructors during the winter months, and aluminum plant or mining industry employees pumping gas during a temporary plant shut-down.

29. 175 Mont. 345, 574 P.2d 251 (1978).

30. *Id.* at 349, 574 P.2d at 253.

workers' compensation benefits are provided, and in spite of the fact that the previous definition of permanent partial disability would better serve that humanitarian purpose, that definition was changed by the 1987 amendments so that the law now provides as follows:

(14) "Permanent partial disability" means a condition, after a worker has reached maximum healing, in which a worker:

(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and

(b) is able to return to work in the worker's job pool pursuant to one of the options set forth in 39-71-1012 but suffers impairment or partial wage loss, or both.³¹

The benefits provided for physical impairment are so minimal as to be insignificant,³² and there are no longer any disability benefits provided for impairment to "earning capacity" without actual wage loss.

Furthermore, the circumstances under which injured workers qualify for permanent *total* disability benefits have been radically limited by the introduction of the "job pool"³³ concept to the Act. "Job pools" provide no practical benefit to the worker, but are a computerized illusion created by bureaucrats and the proliferating rehabilitation industry as an excuse for terminating total disability benefits, even though a worker has no practical possibility of finding employment as a result of his injury.

Under the former Act, "permanent total disability" was defined as "a condition resulting from injury . . . that results in the loss of actual earnings or earning capability . . . and which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market."³⁴ Under this standard, the Montana Supreme Court held in *Coles v. Seven Eleven Stores*³⁵ that the worker must prove which jobs constitute his normal labor market, and that he has a complete inability to perform the duties associated with those jobs. Once he had done

31. MONT. CODE ANN. § 39-71-116(14) (1987).

32. For example, pursuant to MONT. CODE ANN. § 39-71-703 (1987), a worker with a five percent physical impairment of his back would be entitled to a maximum benefit of 25 weeks times one-half the state's average weekly wage at the time of his injury. By 1988 standards, that amount would equal \$3,737.50.

33. A worker is no longer considered totally disabled until he has no reasonable prospect for reemployment. His total disability status is now terminated if it is determined that he is capable of performing work in his "job pool." MONT. CODE ANN. § 39-71-116(15) (1987).

34. MONT. CODE ANN. § 39-71-116(13) (1985), *amended by* MONT. CODE ANN. § 39-71-116(15) (1987).

35. — Mont. —, 705 P.2d 1048 (1985).

so, the court held, the burden shifted to the insurer to show that suitable work was available.³⁶

Under the new Act, the insurer has no burden to show that any work is actually available for a claimant before terminating him from total disability benefits. Under the new Act, "permanent total disability" is defined as "a condition resulting from injury as defined in this chapter, after a worker reaches maximum healing, in which a worker is unable to return to work in the worker's *job pool* after exhausting all options set forth in 39-71-1012."³⁷

The new Act defines a "worker's job pool" as follows:

(7)(a) . . . those jobs typically available for which a worker is qualified, consistent with the worker's age, education, vocational experience and aptitude and compatible with the worker's physical capacities and limitations as a result of the worker's injury. Lack of immediate job openings is not a factor to be considered.

(b) A worker's job pool may be either local or statewide, as follows:

...

(ii) A statewide job is one anywhere in the state of Montana.³⁸

To understand the significance of this change, it is important to understand the role of vocational consultants. Vocational consultants are expert witnesses retained by insurers, employers, and claimants to testify in workers' compensation cases regarding an injured worker's prospects for employment. In the past five years, they have become the largest growth industry in the state.³⁹ The problem with vocational consultants is that their opinions and testimony are routinely based on computer analyses of job descriptions compared to physical restrictions and rarely, if ever, have anything to do with the actual availability of a job or an employer's willingness to hire a partially disabled worker if a job is available.

The previous definition of total disability was preferable for two reasons. First of all, it gave the Workers' Compensation Court a basis for considering the practical impact of a worker's injury

36. *Id.* at ___, 705 P.2d at 1051 (citing *Metzger v. Chemetron Corp.*, ___ Mont. ___, ___, 687 P.2d 1033, 1035 (1984)).

37. MONT. CODE ANN. § 39-71-116(15) (1987) (emphasis added).

38. MONT. CODE ANN. § 39-71-1011 (1987).

39. While exact figures are unavailable, Randy Kenyon from Crawford Rehabilitation Associates in Kalispell, Montana, estimates that the number of vocational consultants in Kalispell alone has gone from two to 13 in the past five years. Jerry Davis, last year's Membership Director for Rehabilitation Associates of Montana, estimates that the total number of consultants in Montana has increased from 20 to 120 over the past five years.

rather than a theoretical impact. Second, it gave the Workers' Compensation Court some discretion in evaluating the weight to be given to the testimony of the state's new army of vocational consultants. Under the new Act, the practical impact of an injury on a worker is irrelevant and the consultant's computer printouts, which bear no relationship to reality, are now binding on the court's determination of total disability.

The future frustration level for injured workers will be substantially increased when they find that the disability benefits upon which they are totally dependent to support themselves and their families have been terminated based upon a theoretical job description in some other part of the state, even though no job is available, the employer would not hire them if it was available, and they could not afford to move and uproot their families for the job if the employer would hire them. Unfortunately, injured workers probably will not have the same political clout that disgruntled loggers traditionally wield in the state of Montana.

IV. BENEFITS FOR PERMANENT PARTIAL DISABILITY

In addition to excluding many injured workers from coverage and arbitrarily terminating coverage based on artificial standards for disability, the new Act further limits the rate at which disability benefits will be paid and arbitrarily limits the duration of payment.

Under former law, compensation for injuries causing partial disability was paid on the following basis and for the following duration:

(1) Weekly compensation benefits for injury producing partial disability shall be 66 $\frac{2}{3}$ % of the actual diminution in the worker's *earning capacity* measured in dollars, subject to a maximum weekly compensation of one-half the state's average weekly wage.

(2) The compensation shall be paid *during the period of disability*, not exceeding, however, 500 weeks in cases of partial disability⁴⁰

In other words, under the old Act, a worker's partial disability rate was based upon a percentage of the difference between what he was capable of earning on the open job market prior to his injury and what he was able to earn with his injury. The benefits were payable so long as the worker remained partially disabled, not ex-

40. MONT. CODE ANN. § 39-71-703 (1985) (emphasis added), *amended by* MONT. CODE ANN. § 39-71-703 (1987).

ceeding 500 weeks. The duration of benefits was not to be reduced by a factor equal to the percentage of disability.⁴¹

Under current law,⁴² workers are eligible for either impairment awards or wage supplements. Impairment awards are based upon physical impairment ratings awarded by physicians and have nothing to do with the impact that an injury has on a worker's ability to earn a living.⁴³ The award is also a minimal amount and based upon five weeks of partial disability benefits for each percentage of physical impairment. For example, the average impairment rating following surgery on a herniated disk with a resulting fusion of the spine would be between ten and fifteen percent.

In order to recover wage supplement benefits, the following test has been established:

(i) A worker must be compensated in weekly benefits equal to 66% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half of the state's average weekly wage at the time of injury.

(ii) Eligibility for wage supplement benefits begins at maximum healing and terminates at the expiration of 500 weeks minus the number of weeks for which a worker's impairment award is payable A worker's failure to sustain a wage loss compensable under subsection (1)(b)(i) does not extend the period of eligibility. . . .⁴⁴

In other words, a worker's partial disability benefits under the new benefit provision are now determined by comparing what the worker *actually earned* at the time of his injury to some wage that he might theoretically be capable of earning subsequent to his injury. The new law thus uses the most conservative possible standard for pre-injury earning capacity and the most liberal possible standard for post-injury earning capacity. It makes no difference if the worker had been capable of working in heavy industry at \$12 an hour and was injured during a temporary lay-off while pumping gas for \$3.35 an hour. The fact that the worker is now physically incapable of returning to his former occupation will have no bearing on the rate at which he is paid partial disability benefits.

To make matters even more unfair, the reduced actual earnings at the time of his injury will be compared to some theoretical

41. *McDanold v. B. N. Transp., Inc.*, ____ Mont. ____, 679 P.2d 1188 (1984).

42. MONT. CODE ANN. § 39-71-703 (1987).

43. *Id.*

44. MONT. CODE ANN. § 39-71-703(1)(b) (1987).

earnings in the worker's "job pool" after his injury. It makes no difference that the job is unavailable, that the employer would not hire the worker, or that the job is 500 miles away on the other side of Montana. In determining the pre-injury standard, actual earnings are all that count. However, in determining the post-injury standard against which pre-injury earnings must be compared, the computer and the vocational consultant's imagination are the only limits.

To make matters worse, the duration for wage supplement benefits is arbitrarily limited to 500 weeks from the date of maximum healing.⁴⁵ A worker who shows the initiative and determination to try to return to his former employment, even though he proves ultimately unable to continue in that job, is penalized. If the worker is able to return to work for one year and then is forced to find other employment at a reduced wage, that fifty-two week period is deducted from the 500 week duration for wage supplement benefits.⁴⁶ If the worker, through extraordinary efforts, returns to former employment for up to five years, the duration for wage supplement benefits is more than cut in half, even though the reduced income may remain for the remainder of that worker's work life.⁴⁷

Such a scheme is arbitrary, irrational and, by design, unfair to the worker who has forfeited common-law rights to compensation for what now appears, at best, to be an illusory system of income protection.

What sense does it make to limit a worker's pre-injury earning capacity to his actual earnings at the time of his injury, but base his post-injury earning capacity on a "job pool" which may have no practical relevance to what he is actually able to earn? In the worst case scenario, the worker's actual earnings at the time of his injury may be atypically low and unrepresentative of what he was actually capable of earning, and his "job pool" may represent no real opportunities for employment. That worker may find himself unable to continue in employment that would previously have paid \$30,000 to \$40,000 a year, with no realistic alternatives in the present job market, and no disability benefits under Montana's current workers' compensation system. That worker has received nothing of value in exchange for the forfeiture of his common law and constitutional rights to legal redress.⁴⁸ If this is the price of

45. MONT. CODE ANN. § 39-71-703(1)(b)(ii) (1987).

46. *Id.*

47. *Id.*

48. MONT. CONST. art. II, § 16.

improving Montana's economic climate, then the price is too high.

V. LUMP SUM CONVERSION OF FUTURE BENEFITS⁴⁹

Under previous law,⁵⁰ injured workers could request that future disability benefits be paid in a lump sum rather than bi-weekly. If the insurer refused to do so, then a controversy was created over which the Workers' Compensation Court had jurisdiction.⁵¹ In deciding whether future benefits should be converted to a lump sum, the court ruled that biweekly benefits were favored and lump sums were the exception.⁵² However, lump sums would be freely permitted where they were in the best interests of the claimant, his family, or the public, and were justified by the existence of a pressing need or outstanding indebtedness.⁵³

The former lump sum provision in the Workers' Compensation Act was an important element in the humanitarian purpose that the Act was intended to serve. Most workers, especially those in heavy industry and in some of the higher paying jobs, have their income substantially reduced during their period of disability. In order to continue making payments on their homes, motor vehicles, home appliances, and other purchases which were made prior to their injury, many workers incur substantial debt which can be repaid only at the end of their healing period by converting future disability benefits to a lump sum. Those workers were better off and they improved their cash flow situation by converting disability benefits to pay off their debts rather than continuing to receive the benefits biweekly. This was true even though, in most instances, it was necessary for the worker to pay a portion of the lump sum to an attorney in order to recover benefits in that form.

There are also many workers who are unable to return to their former employment due to a job-related injury, and who are less competitive in the open job market because of employer bias against people who have a disability or who have filed previous workers' compensation claims. Many of those people have talents which could be put to productive use under the old Act by investing future disability benefits in some type of self-employment.

49. See Comment, *1987 Changes to Lump Sum Payments in Workers' Compensation*, this issue.

50. MONT. CODE ANN. § 39-71-741 (1985), amended by MONT. CODE ANN. § 39-71-741 (1987).

51. *Id.*

52. *Utick v. Utick*, 181 Mont. 351, 593 P.2d 739 (1979).

53. *Id.*; *Kustudia v. Indus. Accident Bd.*, 127 Mont. 115, 123, 258 P.2d 965, 969 (1953); *Buckman v. Montana Deaconess Hosp.*, ___ Mont. ___, 730 P.2d 380 (1986).

However, without the option of converting future disability benefits to a lump sum to invest in their own businesses, those workers are relegated to a lifetime of dependency on disability benefits which are worth less every year because they are not increased proportionately with increases in the cost of living. Under the previous Act, the courts also permitted conversion of future disability benefits to a lump sum to pay doctor bills and repair housing,⁵⁴ to purchase housing in a more suitable climate,⁵⁵ to satisfy debts,⁵⁶ and to invest in a business.⁵⁷

Assuming that the purpose of workers' compensation benefits is the humanitarian one of providing for workers and their families when they are unable to do so on their own, it is hard to understand how anyone can object to a provision in the Act which permits those benefits to be paid in the form which is in "the best interests of the claimant, his family, or the public."⁵⁸ However, in the last session of the legislature, the logging industry did object, and the law was amended so that it now provides as follows:

- (1)(a) Benefits may be converted in whole to a lump sum:
 - (i) if a claimant and an insurer dispute the initial compensability of an injury; and
 - (ii) if the claimant and insurer agree to a settlement.
- ... (d) The parties' failure to reach an agreement is not a dispute over which a mediator or the workers' compensation court has jurisdiction.⁵⁹

Section 741(4) further limits the amount of *total disability* benefits that can be converted to a total of \$20,000.

Under the current law, then, no partial disability benefits can be converted to a lump sum without the concurrence of the insurer who will certainly concur only when it is in the insurer's best interest. The injured worker's best interest is totally irrelevant because he has no right to submit the issue to the Workers' Compensation Court in the event that the insurer refuses to agree to a settlement. Further, there is no role for an attorney because the only value of an attorney is his ability to compel a recalcitrant insurer to provide the benefits required by law. If the insurer has to pay only what it wants to pay, then nothing that the worker receives is due to the attorney's effort and workers' futures are dependent on the whims

54. *Hock v. Lienco Cedar Prod's.*, ___ Mont. ___, 634 P.2d 1174 (1981).

55. *Polich v. Whalen's O.K. Tire Warehouse*, 203 Mont. 280, 661 P.2d 38 (1983).

56. *Willoughby v. Arthur G. McKee & Co.*, 187 Mont. 253, 609 P.2d 700 (1980).

57. *Utick*, 181 Mont. 351, 593 P.2d 739.

58. *Kustudia*, 127 Mont. at 123, 258 P.2d at 969.

59. MONT. CODE ANN. § 39-71-741(1) (1987).

of the insurance industry—an industry not historically noted for its sense of civic responsibility and compassion.

While permanently disabled workers do have a right to request that the court intervene and order conversion of total disability benefits to a lump sum, the amount that can be advanced under those circumstances is limited to \$20,000. That amount will be of little benefit to most workers, considering the magnitude of the financial problems they face after losing a \$30,000 to \$40,000 a year job, or considering the cost of investing in any business with a reasonable probability of success.

Because of the changes in the law, workers injured in the future will lose homes that they have owned for years, lose their only means of transportation, and lose many of the material comforts for which they may have worked for ten or twenty years prior to an injury. Many workers will be forced to go back to work that they are physically incapable of performing, or go back to work sooner than they should, and thereby further aggravate their physical condition. These workers may end up being a greater expense to the system in the long run than if they had been permitted to arrive at some reasonable, dignified resolution of their cases, as they were permitted to under the old law when they could establish that it was "in the best interests of the claimant, his family, or the public."⁶⁰

Economic considerations aside, the practical elimination of lump sum settlements in workers' compensation cases is one more indignity imposed on the least fortunate members of society, those who have already sacrificed constitutional rights possessed by every other citizen of this state in exchange for an increasingly illusory workers' compensation system.

VI. ATTORNEY FEES

Under the former Workers' Compensation Act, disability benefits were not designed to provide injured workers with a life of luxury. Even the totally disabled received only two-thirds of their earnings at the time they were injured, or the average weekly wage, whichever was less.⁶¹ No matter how long the worker remained totally disabled, those benefits never increased to compensate for increases in the cost of living. Those benefits provided, at best, mere subsistence, especially for workers who were in a high income

60. *Kustudia*, 127 Mont. at 123, 258 P.2d at 969.

61. MONT. CODE ANN. § 39-71-701 (1985), amended by MONT. CODE ANN. § 39-71-701 (1987).

bracket and had accordingly assumed greater living expenses by the time of their injury.

For these reasons, injured workers whose benefits were wrongfully denied could not be expected to pay an attorney to recover the correct amount of their benefits and still have enough to live on. Therefore, the Act provided that where an insurer denied a claim which was later adjudged compensable, or where there was a controversy regarding the amount of compensation and the court awarded an amount greater than the amount offered by the insurer, the claimant could be awarded his costs and attorney fees in addition to his benefits.⁶² The rationale for these provisions was simple and fair. Workers are entitled to the full amount of benefits provided for by law, and if they have to incur expense to recover the benefits, the insurer, which made it necessary for them to incur that expense, should pay the expense. The worker cannot reasonably be expected to pay the expense out of disability benefits which are barely sufficient to provide for his subsistence. The worker's net recovery should equal the benefits to which he was legally entitled in the first place.

This "net recovery" concept was discussed by the Montana Supreme Court in *Wight v. Hughes Livestock Co., Inc.*⁶³ In that case, the supreme court concluded that the statutes awarding attorney fees to a successful claimant were for the purpose of providing the claimant with a "net recovery" equal to his lawful benefits and that where a claimant had entered into a contingent fee agreement with his attorney, there was a presumption that the contingent fee agreement was the reasonable basis for the award of attorney fees entered against the insurer. In that case, the court reasoned,

If therefore, the social purpose of Workers' Compensation Acts is to provide for the injured worker a fund which replaces his lost earnings or his lost earning capacity, the reasonable cost of effectuating such social purpose where litigation is necessary ought also be the burden of the industry. Any erosion of the worker's right of recovery by imposing upon the worker the cost of procuring his rights erodes to that extent the social purpose.

It is clear to us that it is the objective of the statutes allowing attorneys fees in compensation cases to preserve intact the eventual award recovered by the claimant for his impairment, by assessing in addition his attorneys fees and costs against the insurer

62. MONT. CODE ANN. §§ 39-71-611, 612 (1985), amended by MONT. CODE ANN. §§ 39-71-611, 612 (1987).

63. 204 Mont. 98, 664 P.2d 303 (1983).

or employer.⁶⁴

Although the Montana Supreme Court's reasoning in *Wight* was unassailable, the legislature was quick to react to that decision by amending the Workers' Compensation Act in 1985.⁶⁵ That amendment provided that when attorney fees were awarded against an insurer or an employer, the sum must be based on the number of hours spent by the attorney rather than on the contingent fee that his client must actually pay.⁶⁶

In 1987, however, the Division of Workers' Compensation and employers around the state were unsatisfied with the extent to which workers' rights had been eroded two years earlier. They sought and received further amendments to the attorney fee provisions which assure that practically no worker will be compensated for the "cost of procuring his rights." The law now provides in relevant part that:

(1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:

(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) the claim is later adjudged compensable by the workers' compensation court; and

(c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.⁶⁷

Workers who have to retain attorneys to recover their benefits receive no reimbursement for that cost in cases where the insurer has acted unreasonably and caused them to incur substantial expense but paid the benefits prior to the entry of a judgment. Neither are workers reimbursed for the substantial cost of an attorney even where their benefits have resulted from a judgment of the court unless they can satisfy the difficult burden of proving the insurer's unreasonable state of mind or motivation for denying their benefits.

The new burden placed upon workers before an award of attorney fees can be made is similar to the burden previously placed on claimants prior to the imposition of a twenty percent penalty

64. *Id.* at 108, 664 P.2d at 309.

65. MONT. CODE ANN. § 39-71-614 (1985), amended by MONT. CODE ANN. § 39-71-614 (1987).

66. *Id.*

67. MONT. CODE ANN. § 39-71-611 (1987). MONT. CODE ANN. § 39-71-612 (1985) was similarly amended to provide a requirement that the insurer's actions be adjudged unreasonable. MONT. CODE ANN. § 39-71-612 (1987).

on the insurer for unreasonable delay or denial of a claim.⁶⁸ Under that provision, which was raised in practically every case litigated, hardly any penalties have been imposed.

The practical effect of this change in attorney fee provisions is that even if there are attorneys available who will accept cases for claimants under the new Act, every claimant will have to balance the cost of hiring an attorney to secure the full measure of his benefits against the reduced amounts of benefits that are being offered by the insurer. In other words, the system can now effectively be used by the insurer to reduce its obligations to injured workers to substantially less than is required by law.

The preceding discussion presumes that under the new Workers' Compensation Act there will remain any attorneys interested in representing claimants. However, it is doubtful that that will be the case. First of all, the primary method by which claimants' attorneys were paid under the old Act was by charging a percentage of any lump sum recoveries that they eventually negotiated, or which were paid to the claimant as a result of a court order. Those lump sum recoveries may not have been received for years after the attorney-client relationship was established. In the meantime, the claimant's attorney usually performed numerous services to assure that benefits were paid in a timely fashion, that disputed medical benefits were paid, that travel expenses were reimbursed, and that the claimant was not prematurely terminated from disability benefits. None of those services were ever billed to the claimant because of the probability that at some point, the claimant would need to negotiate a settlement of his case for economic reasons, and he would be better off having an attorney's assistance when doing so.

As pointed out in the previous section, settlements are no longer permitted in partial disability cases unless agreed upon by the insurer, and settlements in total disability cases have been arbitrarily limited to an amount which will have no practical benefit to a totally disabled person.⁶⁹ Therefore, there is no service that an attorney can provide to a claimant in recovering a lump sum settlement, and no motivation for an attorney to provide years of free services to a claimant in relation to all the other minor disputes

68. See MONT. CODE ANN. § 39-71-2907 (1985), amended by MONT. CODE ANN. § 39-71-2907 (1987).

69. Pursuant to MONT. CODE ANN. § 39-71-741 (1987), lump sum advances from total disability benefits may not exceed \$20,000. While representing hundreds of disabled workers over the past ten years, I have seen few viable business opportunities which would be possible with an investment that small. On the other hand, I have seen many workers whose delinquent debts during the period of their disability exceeded that amount.

that inevitably occur when injured working people are dependent on an insurance industry which exists for profit, or on a State Compensation Insurance Fund manned by unresponsive bureaucrats.

If any additional insult to the traditional attorney-client relationship was necessary in order to eliminate attorneys totally from any role representing claimants in workers' compensation disputes, it occurred on April 1, 1986, when the Administrator of the Division amended the Division's Attorney Fee Rule.⁷⁰ The law has, since 1973, given the Division the authority to regulate attorney fees charged by claimant's attorneys.⁷¹ Based upon hearings which sought input from the Bar, employers, and the insurance industry, the Administrator of the Division in 1975 determined that in cases which had not gone to trial, it was reasonable for a claimant's attorney to recover a contingent fee of up to twenty-five percent; that in cases which did go to trial, that fee could be increased to thirty-three percent; and that in cases which resulted in a decision from the Montana Supreme Court, it was reasonable for a claimant's attorney to charge forty percent.⁷² The unique needs of injured workers for contingent fee arrangements were emphasized by the Montana Supreme Court in *Wight*.⁷³ However, in 1986 a new Administrator, whose express intent⁷⁴ was to eliminate the role of attorneys in resolving disputed workers' compensation claims, amended the administrative rule⁷⁵ to reduce the percentages permitted to twenty percent in those cases which have not gone to trial and twenty-five percent in those cases where a judgment has been entered. Furthermore, in those cases where an hourly rate is agreed upon between a worker and his attorney, the attorney is prohibited from charging more than \$75 per hour. At the same time, no limits were placed upon the fees that insurers or employers can pay for the attorneys they retain to defend them. Presumably, a higher value can be attached to those services even though defense fees are an additional expense tacked on to the cost of disability benefits, while a claimant's fees will, in most cases, be paid from the benefits awarded to the claimant.

70. ADMIN. R. MONT. 24.20.3801 (1987).

71. R.C.M. § 92-701.1 (1947) (enacted 1973 and recodified at MONT. CODE ANN. § 39-71-613 (1987)).

72. ADMIN. R. MONT. 24.20.3801 (1987).

73. 204 Mont. 98, 664 P.2d 303.

74. The statement of purpose for the Act found in MONT. CODE ANN. § 39-71-105(3) (1987) states that to meet the Act's objectives, "The system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities."

75. ADMIN. R. MONT. 35.39.3801 (1987).

When attorneys object to restrictions on attorney fees, their objections are understandably treated with skepticism and their concern construed to be self-serving. Those natural reactions were exploited with great skill in the last session of Montana's legislature which produced these changes in the Workers' Compensation Act. However, the role of the claimant's attorney is absolutely essential in a workers' compensation system which is by nature adversarial.

The insurance companies exist to make a profit. They make a profit by minimizing the disability benefits they pay whenever they have an opportunity to do so, and their claims departments are staffed by trained professionals who handle disability claims on a daily basis and know where they can cut corners to save the company money.

The biggest insurer in the state is the State Compensation Insurance Fund, which is not operated for profit, but has, in recent years, served the political interests of the chief executive who runs it. At the beginning of the 1987 session of the legislature, the State Compensation Insurance Fund was operating at a deficit variously estimated in the range of \$150,000,000.⁷⁶ The only way to reduce the deficit without increasing rates to politically influential industries or employers is to reduce benefits, either lawfully or unlawfully, to workers. The State Compensation Fund is staffed with claims personnel who deal with legal issues on a daily basis and are trained in the nuances of resolving claims or terminating benefits with the least amount of expense to the State Fund.

Most injured workers, on the other hand, have never before been involved with a workers' compensation claim. Most people who are injured are not white collar professionals who have a college education. They are blue collar workers doing the most dangerous work which typically requires the least amount of education. They do not know what their rights are and they are ill-equipped to deal with trained claims personnel. Without a lawyer to advise them, they are at the total mercy of an industry which has an economic or political interest in reducing the amount of benefits they are paid whether or not it is the lawful thing to do.

That is why the number one objective of both the Administrator for the Division of Workers' Compensation and the logging industry in the last session of Montana's legislature was to eliminate the role of the claimant's attorney in this adversarial process.⁷⁷

76. MCKINNEY, REPORT OF THE MONTANA OFFICE OF THE LEGISLATIVE FISCAL ANALYST TO THE LEGISLATIVE FINANCE COMMITTEE, at 3 (April 6, 1988).

77. See, e.g., MONT. CODE ANN. § 39-71-105(3) (1987).

They did so by eliminating the “net recovery” concept, by eliminating lump sums which were the primary method of paying claimant’s attorneys, and by further restricting the amount a claimant can pay his attorney to the point where it would be unprofitable to hire an attorney to handle a case for an injured worker, even if he could afford to pay an attorney.

Because of these changes, workers who are injured after the effective date of the most recent amendments to the Workers’ Compensation Act⁷⁸ will be unable to retain attorneys to represent them, no matter how serious their disputes regarding the benefits to which they are entitled. For that reason, benefits paid to injured workers in Montana will be whatever the insurer or State Fund decide, at their whim, to pay.

VII. CONCLUSION

The Workers’ Compensation Act, which provides for disability benefits to injured workers in Montana, was amended by the 1987 legislature into a meaningless sham rather than into a viable alternative to the right to full legal redress guaranteed by the Montana Constitution⁷⁹ and given up by injured workers.

By unreasonably and arbitrarily limiting the definition of an injury which is covered by the Act; by limiting the period of disability in a way that bears no meaningful or actual relationship to the worker’s real disability; by eliminating partial disability benefits for actual impairment to a worker’s earning capacity; by, for all practical purposes, eliminating a worker’s right to convert future disability benefits to a lump sum regardless of the severity of his need; and by making it impossible for injured workers to retain the services of an attorney, even when their benefits have been wrongfully denied or terminated, the legislature has created a festering sore in Montana’s economy which will eventually undermine the kind of employer-employee relations which are necessary for any real economic recovery in Montana.

The legislature’s conduct in enacting the changes that it made to the Workers’ Compensation Act in 1987 was irresponsible, contrary to the humanitarian purposes for workers’ compensation benefits, and short-sighted. Eventually changes will have to be made to reconcile the common-law rights which have been given up by workers and the benefits they were supposed to have received in return. However, in the meantime, thousands of workers will expe-

78. July 1, 1987; Act of April 14, 1987, ch. 464, 1987 Mont. Laws 1092.

79. MONT. CONST. art. II, § 16.

rience extreme economic and personal hardships because of the disproportionate amount of influence exercised in the last legislature by those employers, such as loggers, whose employees must work under the most dangerous circumstances.

The Fiftieth Session of Montana's legislature will not be known in history for its statesmanship or fairness when balancing basic human needs against increased profits for the few.